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No. 03-493

In The
Supreme Court of the United States

CHARLIE ANNIS, MARY K. BERGEN, JERRY BRITTAIN, GORDON CALERWOOD, WALTER CROW, QUINTON DAVIS, DON FIELDS, BOB GLANDON, TOM HAMILTON, DON HANLEY, LARRY HENSLEY, LARRY HILLYARD, BOB HURST, LEROY KEENER, JERRY C. MILLER, DOYLE MILLS, BOB NEELY, K. DON RISINGER, JERRY STURGEON, BILL VILLINES AND DEE WELLS,

Petitioners,

v.

OKLAHOMA LAW ENFORCEMENT RETIREMENT BOARD, ROY ROGERS, LINDA AKER, SCOTT BEHANNA, RENDA REESE-DAVIS, MICHAEL DIXON, JIM KING, JUNE KLAASSEN, KEITH LEIMBACH, JAN MILLER, JAMES PETE PETERSON, HARRY ROSENGRANTS, KEVIN WARD AND PHILLIP R. KEY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Respondents disagree with each of the five (5) questions presented by Petitioners as the questions this Court should consider because the Petitioners' questions presented do not accurately reflect the ruling of the Tenth Circuit Court of Appeals, nor are the issues which Petitioners now seek to raise the same issues which were presented below. The sole question which should be presented to this Court is:

1. Did the Tenth Circuit Court of Appeals correctly determine whether Petitioners' cause of action was moot because the relevant statute was amended after the district court rendered its March 5, 2002, decision?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS AND DISTRICT COURT

The parties to the proceeding before the United States District Court for the Western District of Oklahoma consisted of 181 Plaintiffs and the Oklahoma Law Enforcement Retirement Board and its 13 individual Board members who were named as Defendants.

Upon the filing of the appeal to the Tenth Circuit Court of Appeals, the Plaintiffs became Appellants, with 6 of the Plaintiffs voluntarily dismissing their cause of action.

In the case before this Court only 21 individuals are currently appearing as Petitioners. Of the 21 named Petitioners, 4 individuals appear to have been included as Petitioners who were not named parties to the litigation below, specifically: Mary K. Bergen, Larry Hensley, Leroy Keener and Dee Wells. The Respondents respectfully request that these four individuals who were not named parties below be stricken as Petitioners from the instant Petition For Writ of Certiorari.

In addition to these 4 individuals, there are an additional 10 individuals listed as Petitioners whose names are different in the Petition than how they appeared in the proceedings below, specifically: Jerry Brittain, Gordon Calerwood, Bob Glandon, Tom Hamilton, Don Hanley, Larry Hillyard, Bob Hurst, Bob Neely, K. Don Risinger, Bill Villines. Although the differences in the names are subtle, Respondents assume that these 10 individuals may be the same individuals from the proceedings below; however, in the event they are not the same individuals,

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS AND DISTRICT COURT – Continued

the Respondents would object to their being included in this action.

The current list of named Petitioners include:

CHARLIE ANNIS, MARY K. BERGEN, JERRY BRITTAIN, GORDON CALERWOOD, WALTER CROW, QUINTON DAVIS, DON FIELDS, BOB GLANDON, TOM HAMILTON, DON HANLEY, LARRY HENSLEY, LARRY HILLYARD, BOB HURST, LEROY KEENER, JERRY C. MILLER, DOYLE MILLS, BOB NEELY, K. DON RISINGER, JERRY STURGEON, BILL VILLINES AND DEE WELLS.

The following parties were named as Defendants in the district court, Appellees in the proceeding before the Court of Appeals, and are currently appearing as Respondents herein:

OKLAHOMA LAW ENFORCEMENT RETIREMENT BOARD, ROY ROGERS, LINDA AKER, SCOTT BEHANNA, RENDA REESE-DAVIS, MICHAEL DIXON, JIM KING, JUNE KLAASSEN, KEITH LEIMBACH, JAN MILLER, JAMES PETE PETERSON, HARRY ROSENGRANTS, KEVIN WARD AND PHILLIP R. KEY

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceedings in the Court of Appeals...	ii
Table of Contents	iv
Table of Authorities	vi
Orders Entered in the Case	1
Basis for Jurisdiction in this Court	1
Constitutional Provisions, Statutes, and Other Authorities Involved in the Case	3
Statement of the Case	4
Arguments for Denying the Petition	6
A. The Decision of the Tenth Circuit Court of Appeals Dismissing the Appeal of the Plaintiffs/Appellants Based Upon Mootness Was Correct and Does Not Merit Review by This Court	6
1. Petitioners Have Not Established a Compelling Reason for Granting the Writ	6
2. The Petitioners' Claims That the Tenth Circuit Court of Appeals Violated the Oklahoma Constitution Are Both Unfounded and Improperly Raised	8
3. The Tenth Circuit Followed Well Established Law in Dismissing the Appeal as Moot	10
4. When Considering the Constitutionality of a Statute, the Courts Will Only Rule Out of Necessity	14

TABLE OF CONTENTS – Continued

Page

5. Because the Tenth Circuit Dismissed the Appeal as Moot, It Did Not Have to Rule on the Correctness of the Trial Court's Decision and Therefore Petitioners' Propositions II and III Are Irrelevant to This Court's Consideration 17

   a. Petitioners Are Not Entitled to the Protection Accorded by the *Baker* Case 18

   b. Statute of Limitations Apply to Petitioners' Claims 22

   c. Oklahoma Has Applied a Five Year Statute of Limitations to Claims Identical To Petitioners 22

   d. The Opinion of the Attorney General of Oklahoma Cited by the Petitioners Is Inapplicable to the Oklahoma Law Enforcement Retirement System 23

Conclusion 25

TABLE OF AUTHORITIES

Page

A. CASES

Baker v. Oklahoma Firefighters Pension and Retirement System, 1986 OK 8, 718 P.2d 348....19, 20, 21

Barrows v. Jackson, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed 1586 (1953)..... 9

Beattie v. United States, 949 F.2d 1092 (10th Cir. 1991).....12, 13

Board of Trustees v. Burns, 1959 OK 275, 348 P.2d 1067.....19

Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed 2d 830 (1973).....17

Church of Scientology of California v. United States, 506 U.S. 9, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992).....12

City of Oklahoma City v. Daly, 1957 OK 209, 316 P.2d 129.....22

Dablemont v. State, Department of Public Safety, 1975 OK 162, 543 P.2d 562..... 9

Faustin v. City and County of Denver, 268 F.3d 942 (10th Cir. 2001).....12

Gilbert v. City of Cambridge, 745 F. Supp. 42 (D. Mass. 1990).....22

Grace Drilling Co. v. Novotny, 1991 OK CIV APP 24, 811 P.2d 907.....10

Grand Jury Sub. Dated Dec. 7 and 8 v. U.S., 40 F.3d 1096 (10th Cir. 1994).....13

In Re Central Oklahoma Master Conservancy Dist., 1961 OK 23, 359 P.2d 725.....9, 14

TABLE OF AUTHORITIES – Continued

Page

In Re Mayes-Rogers Counties Conservancy Dist. Form, 1963 OK 206, 386 P.2d 150 .....9, 14

In Re Osborn, 24 F.3d 1199 (10th Cir 1994).....13

Kinzy v. State ex rel. Oklahoma Firefighters Pension and Retirement System, 2001 OK 24, 20 P.3d 818 22

McClendon v. City of Albuquerque, 100 F.3d 863 (10th Cir. 1996) 12

Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988) 22

Miller v. Udall, 368 F.2d 548 (10th Cir. 1966).....12

Oklahoma City, Oklahoma v. Dulick, 318 F.2d 830 (10th Cir. 1963) 15

Paul v. State, 1971 OK CR 28, 483 P.2d 1176 8

Pelican Production Corp. v. Mize, 1977 OK 235, 573 P.2d 703 10

Tileston v. Ullman, 318 U.S. 44, 63 S.Ct. 493, 87 L.Ed. 603 (1943)..... 9

B. CONSTITUTIONS, STATUTES, AND OTHER AUTHORITIES

United States Constitution, Eleventh Amendment 23

United States Constitution, Fourteenth Amendment 3

Oklahoma Constitution, Article 2, Section 15.....3, 8, 10

Oklahoma Constitution, Article 5, Section 54.....3, 9, 10

11 O.S. §49-100 et seq 24

11 O.S. §50-101 et seq 24

12 O.S. Supp. 2000, §95 .....3, 22

TABLE OF AUTHORITIES – Continued

Page

47 O.S. §2-300 et seq.....3, 5

47 O.S. Supp. 1980, §2-305.....3, 17, 18

47 O.S. Supp. 2002, §2-305.....3, 9, 10

OKLA. STAT. tit. 47, §2-305.....*passim*

74 O.S. §901 et seq.....3

74 O.S. §923(A).....3

Sup. Ct. R. 10.....2, 3

Sup. Ct. R. 15(2).....4, 18

Attorney General's Opinion 95-45, dated March 28, 1996.....24

CITATIONS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

1. On April 24, 2003, the Tenth Circuit Court of Appeals in Case No. 02-6246 concluded that the issues raised by the Plaintiffs/Appellants in their appeal were moot and thereby dismissed Plaintiffs/Appellants' appeal. This Order and Judgment is attached as Appendix A to the Petition. No Petition For Rehearing before the Tenth Circuit Court of Appeals was filed by the Plaintiffs/ Appellants.

2. On July 17, 2002, the District Court For the Western District Of Oklahoma in Case No. CIV-01-418-A (Marten) denied Plaintiffs' Motion For New Trial by Memorandum Order which was filed July 19, 2002. This Memorandum Order is attached as Appendix B to the Petition.

3. On February 27, 2002, the District Court For the Western District of Oklahoma in Case No. CIV-01-418-A (Marten) granted Defendants' Motion to Dismiss by Memorandum Order which was filed March 5, 2002. This Memorandum Order is not attached to Petitioners' Petition. Respondents hereby attach the Memorandum Order filed March 5, 2002, as Appendix A to Respondents' Brief In Opposition.

4. None of the above-referenced Orders were published.

BASIS FOR JURISDICTION IN THIS COURT

The Order and Judgment of the Tenth Circuit Court of Appeals which dismissed Plaintiffs/Appellants' appeal as

moot was filed on April 24, 2003. No petition for rehearing was filed in the case. Petitioners assert in their JURISDICTIONAL STATEMENT that:

> "Jurisdiction is proper pursuant to Supreme Court Rule 10.1(c), which allows the Court to assume jurisdiction in a case where 'a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.'"

Respondents deny that jurisdiction is proper as alleged by the Petitioners pursuant to their citation to "Supreme Court Rule 10.1(c)". Assuming the Petitioners were referring to Supreme Court Rule 10(c), the Respondents would still disagree with Petitioners' assertion that "a United States court of appeals [the Tenth Circuit] has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable [relevant] decisions of this Court". The Respondents believe that the United States Court of Appeals for the Tenth Circuit decided this case on a basic fundamental precept of law. That well recognized precept is the doctrine of mootness. Clearly, the Petitioners have not supported in their Petition For Writ of Certiorari by their claim of jurisdiction under Supreme Court Rule 10(c) or any other compelling reason.

CONSTITUTIONAL PROVISION, STATUTES AND OTHER AUTHORITIES INVOLVED IN THE CASE

Respondents disagree with Petitioners' assertions that the "Fourteenth Amendment to the United States Constitution, Article 2, Section 15 of the Oklahoma Constitution, Article 5, Section 54 of the Oklahoma Constitution, or Title 74, Section 923(A) of the Oklahoma Statutes" are applicable to this case. Immediately illustrative of the inapplicability of one of the foregoing provisions is shown by the fact that 74 O.S. §923(A) does not refer to or involve the Oklahoma Law Enforcement Retirement System (***"OLERS"***). 74 O.S. §923(A) involves the Oklahoma Public Employees Retirement System (***"OPERS"***). The laws, pertaining to the Oklahoma Public Employees Retirement System found under 74 O.S. §901 et seq., are separate and distinct from the laws pertaining to the Oklahoma Law Enforcement Retirement System found under 47 O.S. §2-300 et seq. These are two completely separate retirement systems. The remaining cited constitutional sections will be shown to be inapplicable in the body of this response.

The following statutes and other authorities are involved in this case:

(1) Okla. Stat. Tit. 47, §2-305 amended effective July 1, 1980.

(2) Okla. Stat. Tit. 47, §2-305 amended effective July 1, 2002.

(3) 12 O.S. §95.

(4) Rule 10, Supreme Court Rules

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for

compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

. . . .

> (c) a state or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

(5) Rule 15(2), Supreme Court Rules (in pertinent part)

> . . . In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. . . .

STATEMENT OF THE CASE

On **March 8, 2001,** the Plaintiffs, consisting of 181 individuals, filed a Complaint in the United States District Court for the Western District of Oklahoma against the

Defendants, the Oklahoma Law Enforcement Retirement System Board and the 13 individual Board members. Plaintiffs were seeking a declaratory judgment and injunctive relief in support of a claim for money damages as a result of a 1980 legislative change to 47 O.S. §2-300 et seq., involving the retirement laws that relate to the Oklahoma Law Enforcement Retirement System. The Plaintiffs later dismissed their claims for monetary damages choosing only to seek prospective declaratory and injunctive relief concerning future retirement benefits.

The effective date of the legislative change to 47 O.S. §2-305 was **July 1, 1980**. Accordingly, Plaintiffs' Complaint was filed almost **twenty-one (21) years** after the effective date of the 1980 legislative amendment. The Defendants moved to dismiss the case asserting that all of the Plaintiffs' claims were barred by the statute of limitations. The District Court granted Defendants' Motion To Dismiss by Memorandum Order filed March 5, 2002. The Plaintiffs filed a Motion For New Trial on March 14, 2002, which was thereafter denied by Order filed July 19, 2002.

The Plaintiffs thereafter filed an appeal to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit on April 24, 2003, dismissed the Plaintiffs/Appellants' appeal after finding that the Oklahoma Legislature amended OKLA. STAT. tit. 47, §2-305 in its 2002 regular session. The Tenth Circuit determined that the amendment effectively resolved the Plaintiffs/Appellants' complaints concerning future retirement benefits that Plaintiffs/Appellants claimed are due, thereby granting Plaintiffs/Appellants the relief they sought. The Plaintiffs/Appellants conceded that they were granted the relief that they sought. The Tenth Circuit further determined that there was not a live controversy because there were

no continuing present effects, therefore Plaintiffs/Appellants could not demonstrate a good chance of being likewise injured in the future. It is from this determination that the instant Petition for Writ of Certiorari is brought by the 21 named Petitioners.

ARGUMENTS FOR DENYING THE PETITION

A. The Decision of the Tenth Circuit Court of Appeals Dismissing the Appeal of the Plaintiffs/Appellants Based Upon Mootness Was Correct and Does Not Merit Review by This Court.

1. Petitioners Have Not Established a Compelling Reason for Granting the Writ.

Petitioners request that this Court review the Tenth Circuit Court of Appeals' decision dismissing their appeal. Rule 10 of the Supreme Court Rules provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> . . . .
>
> (c) a state or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important

> federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Petitioners have not supported that the writ should be granted for any of the reasons set forth in Rule 10; instead Petitioners argue that a writ is appropriate because the Tenth Circuit applied the doctrine of mootness to dismiss their appeal. Petitioners do not allege that the Tenth Circuit has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter. Nor do they allege that the Tenth Circuit has decided an important federal question in a way that conflicts with a decision by a state court of last resort. Instead, Petitioners argue that the Tenth Circuit "has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court." Yet, Petitioners have not supported their alleged basis for jurisdiction, instead Petitioners argue that the Tenth Circuit decision is in conflict with previously established law and that the Tenth Circuit departed from the accepted and ususal course of judicial proceedings in failing to apply the law of Oklahoma to the facts as found by the trial court. The failure of the Petitioners to support their claimed basis for this Court's jurisdiction should be fatal to their Petition for Writ of Certiorari.

2. The Petitioners' Claims That the Tenth Circuit Court of Appeals Violated the Oklahoma Constitution Are Both Unfounded and Improperly Raised.

Under question 1 of the QUESTIONS PRESENTED by the Petitioners in their Petition, Petitioners ask:

> "1. Whether the Tenth Circuit Court of Appeals erred when it found that legislation passed following the decision in the case by the Western District Court prevented the Petitioners from suffering any continuing or future damages, thus Petitioners' action was moot, and did not find that the passage of specific, 'ex post facto law' by legislature to [sic] solely designed to eliminate Petitioners' cause of action is unconstitutional and in violation of Article II, Section 15 of the Oklahoma Constitution?"

To support this question the Petitioners argue that the 2002 amendment of 47 O.S. §2-305, which granted them the relief that they originally sought from the trial court, is somehow violative of Article 2, Section 15, of the Oklahoma Constitution and is an ex post facto law. Clearly, this is not a criminal case nor is this a case where Petitioners are subject to any type of criminal punishment. This case is purely civil in nature.

In ***Paul v. State***, 1971 OK CR 28, 483 P.2d 1176, the Oklahoma Court of Criminal Appeals in discussing the ex post facto application of sections of law stated:

> "The prohibition of ex post facto legislation is limited to those laws which pertain to the substantive criminal law, such that their retroactive application increases the punishment from a

> crime or detrimentally changes the essential elements of a crime."

In the instant case the 2002 amendment to 47 O.S. §2-305 was applied prospectively only and not retrospectively. Further its passage did not cause or create any disadvantage to a prisoner, rather it provided for additional retirement benefits for the Petitioners. Accordingly, the ex post facto argument must fail.

As to the argument advanced by Petitioners concerning Article 5, Section 54 of the Oklahoma Constitution dealing with repealed statutes, it should be noted that 47 O.S. §2-305 was not repealed but was amended. Once again, this 2002 amendment clearly had no detrimental effect on the Petitioners, rather it gave the Petitioners the retirement benefit that they were seeking.

A longstanding rule under Oklahoma law is that an individual cannot challenge the constitutionality of a statute unless the individual is injured thereby. See ***Dablemont v. State, Department of Public Safety***, 1975 OK 162, 543 P.2d 562; ***In Re Mayes-Rogers Counties Conservancy Dist. Form***, 1963 OK 206, 386 P.2d 150; and ***In Re Central Oklahoma Master Conservancy Dist.***, 1961 OK 23, 359 P.2d 725 wherein the Oklahoma Supreme Court stated: "A statute may not be attacked on constitutional grounds by one not injured thereby." The same is true under federal law. See also ***Barrows v. Jackson***, 346 U.S. 249, 255, 73 S.Ct. 1031, 97 L.Ed 1586 (1953); ***Tileston v. Ullman***, 318 U.S. 44, 46, 63 S.Ct. 493, 87 L.Ed. 603 (1943). Here, the Petitioners have not made any showing of injury and therefore lack the requisite standing to challenge the 2002 amendment to 47 O.S. §2-305.

Beyond the fact that these arguments have been shown to be unfounded and that the Petitioners lack standing, it is also true that these issues were not properly raised or asserted before the Tenth Circuit. Petitioners can easily claim that the Tenth Circuit failed to consider the effect of these constitutional sections as applied to the 2002 legislative amendment of 47 O.S. §2-305 because Petitioners failed to assert either Article 2, Section 15 or Article 5, Section 54 of the Oklahoma Constitution in the appeal before the Tenth Circuit. Under Oklahoma law constitutional challenges cannot be raised for the first time on appeal. See ***Pelican Production Corp. v. Mize***, 1977 OK 235, 573 P.2d 703 and ***Grace Drilling Co. v. Novotny***, 1991 OK CIV APP 24, 811 P.2d 907. Accordingly, because of the failure to raise the issue before the Tenth Circuit, Petitioners are precluded from complaining about the 2002 amendment of 47 O.S. §2-305 for the first time in this proceeding. For these reasons, Petitioners' arguments in their first proposition must fail.

3. The Tenth Circuit Followed Well Established Law in Dismissing the Appeal as Moot.

The proper and only issue before this Court in the consideration of whether or not to grant the Petition for Writ of Certiorari is whether the Tenth Circuit correctly dismissed the appeal below as moot.

The Complaint filed by the Plaintiffs below stemmed from a 1980 legislative amendment to the retirement law at issue, 47 O.S. §2-305. The Plaintiffs claim that as a result of the 1980 legislative amendment that their future retirement benefits were unconstitutionally affected.

Although Plaintiffs initially sought payment for retirement benefits from the period starting in 1980 to present when otherwise eligible, this claim for retroactive retirement benefits has since been abandoned. Accordingly, the Plaintiffs' revised claim did not seek to recover past money damages against Defendants below, but rather only sought to obtain a declaratory judgment and injunctive relief requiring Defendants below to make future monthly retirement payments in accordance with the law in effect prior to 1980. Thus, Plaintiffs' claims for increased monthly benefits were prospective in nature only.

In the Forty-Eighth Legislature of the State of Oklahoma, Second Regular Session, which convened February 4, 2002, the Oklahoma Legislature passed an amendment to 47 O.S. §2-305, which has in effect returned this section of the retirement law to its pre-1980 application. (See the Oklahoma Session Laws 2002, Volume 1, Oklahoma Law Enforcement Retirement System Act, ch. 332, pg. 1187, pertaining to H.B. No. 2212 and 47 O.S. §2-305, effective July 1, 2002.).

The Tenth Circuit dismissed the appeal after finding that the Oklahoma Legislature amended OKLA. STAT. tit. 47, §2-305 in its 2002 regular session. The Tenth Circuit determined that the amendment effectively resolved the complaints of the Plaintiffs/Appellants below concerning future retirement benefits that Plaintiffs/Appellants claimed are due, thereby granting Plaintiffs/Appellants the relief they sought. The Plaintiffs/Appellants conceded in prior pleadings filed of record with the court that they were granted the relief that they sought by the 2002 legislative amendment. This fact was recognized by Tenth Circuit in its Order and has not been disputed by the Petitioners. The Tenth Circuit further determined that

there was not a live controversy because there were no continuing present effects, therefore Plaintiffs/Appellants could not demonstrate a good chance of being likewise injured in the future.

The Tenth Circuit in making its determination that the appeal was moot relied upon ***Faustin v. City and County of Denver***, 268 F.3d 942 (10th Cir. 2001), ***McClendon v. City of Albuquerque***, 100 F.3d 863 (10th Cir. 1996), ***Beattie v. United States***, 949 F.2d 1092 (10th Cir. 1991) and ***Church of Scientology of California v. United States***, 506 U.S. 9, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992).

A controlling case from this Court which addresses the consideration of moot questions or abstract propositions by the federal courts is ***Church of Scientology of California v. United States***, 506 U.S. 9, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992), wherein this Court stated:

> It has long been settled that a federal court has no authority "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." Mills v. Green, *159 U.S. 651*, 653 (1895). See also Preiser v. Newkirk, *422 U.S. 395*, 401 (1975); North Carolina v. Rice, *404 U.S. 244*, 246 (1971). For that reason, if an event occurs while a case is pending on appeal that makes it impossible for the court to grant "any effectual relief whatever" to a prevailing party, the appeal must be dismissed. Mills, 159 U.S., at 653. . . .

The Tenth Circuit has also addressed the issues of mootness and abstract questions. In ***Miller v. Udall***, 368 F.2d 548 (10th Cir. 1966), the Court stated:

> "It is quite clear that the Declaratory Judgment Act is not to be used as a means of securing a judicial determination of moot questions. Such would be a determination of non-justiciable issues, and it is well settled that the Act is procedural only, and that its application is restricted to cases and controversies which are such in the Constitutional sense. The judicial inhibition against deciding moot question is of course not limited to the field of declaratory judgments." 6 Moore's Federal Practice, para. 57.13, at 3071 (2d ed. 1965).
>
> This circuit has held, "A court will decide only real controversies in which the rights of the parties are actually involved, not abstract questions. It will not proceed to a determination when its judgment or decree cannot grant relief for want of subject matter upon which it could operate with effect." Jackson v. Denver Producing & Refining Co., *96 F.2d 457*, 461 (10th Cir. 1938).

See also ***In Re Osborn***, 24 F.3d 1199 (10th Cir 1994); ***Grand Jury Sub. Dated Dec. 7 and 8 v. U.S.***, 40 F.3d 1096 (10th Cir. 1994); and ***Beattie v. United States***, 949 F.2d 1092, 1093 (10th Cir. 1991).

From these cases comes the longstanding propositions that mootness is a threshold issue because the existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction and that the federal court has no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. Thus, if an event occurs while a case is pending on appeal that makes it impossible for the court to grant any

effectual relief whatever to a prevailing party, the appeal must be dismissed.

Had the District Court not dismissed the case below based upon the statute of limitations, the Plaintiffs/Appellants before the Tenth Circuit would have received no more relief from the Tenth Circuit than they received by July 1, 2002, legislative amendment of 47 O.S. §2-305. The 2002 legislative amendment made the issues presented by the Plaintiffs/Appellants, abstract questions, for the Tenth Circuits' consideration. Indeed, there was no longer a case or controversy for the Tenth Circuit to determine. Accordingly, based upon the foregoing arguments and authorities, the appeal below had to be dismissed because even the Plaintiffs/Appellants conceded that the Oklahoma Legislature gave them what they were seeking.

4. When Considering the Constitutionality of a Statute, the Courts Will Only Rule Out of Necessity.

Petitioners argue that the Tenth Circuits' decision is in conflict with established law and that the Tenth Circuit departed from the accepted and usual course of judicial proceedings in failing to apply Oklahoma law. However, these arguments as will be shown hereinafter are wholly unfounded. Both Oklahoma and federal law indicates that when considering the constitutionality of a statute, the Courts will only rule out of necessity.

In the case of ***In Re Mayes-Rogers Counties Conservancy Dist. Form***, 1963 OK 206, 386 P.2d 150, the Oklahoma Supreme Court citing its holding from ***In Re***

Central Oklahoma Master Conservancy Dist., 1961 OK 23, 359 P.2d 725, found:

> "A statute may not be attached on constitutional ground by one not injured thereby. In 11 Am. Jur. Constitutional Law, Section 93, p. 720, it is said:
>
> "'While courts will not refuse to pass on the constitutionality of statutes in any proceeding in which such a determination is necessarily involved, needless consideration of attacks on their validity and unnecessary decisions striking down statutes will be avoided. Courts will not assume to pass upon constitutional questions unless properly before them.'
>
> "'One of the most firmly established doctrines in the field of constitutional law is to the effect that a court will pass upon the constitutionality of a law only when necessary to the determination upon the merits of the cause under consideration. The constitutionality of a statute will not be considered and determined by the courts as a hypothetical question, because constitutional questions are not to be dealt with abstractly or in a manner of an academic discussion * * * .'"

A case remarkably similar to the matter before this Court is ***Oklahoma City, Oklahoma v. Dulick***, 318 F.2d 830 (10th Cir. 1963). In the ***Dulick*** case, Oklahoma City property owners brought a declaratory judgment action attacking the validity of certain Oklahoma statutes relating to sanitary sewer districts. The statutes provided for the creation of sewer districts by municipal ordinance. Following the creation of a sewer district which included the property owners' land, the action was brought. The municipal ordinance in question was thereafter repealed. The trial court ruled in property owners favor declaring

the Oklahoma statute unconstitutional. This ruling was appealed to the Tenth Circuit Court of Appeals.

The Tenth Circuit upon considering the matter stated:

> A federal court can declare a state statute void for unconstitutionality only when "it is called upon to adjudge the legal rights of litigants in actual controversy." Liverpool, New York and Philadelphia Steamship Company v. Commissioners of Emigration, *113 U.S. 33*, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899; quoted in Baker v. Carr, *369 U.S. 186*, 204, 82 S.Ct. 691, 703, 7 L.Ed. 2d 663. Federal Courts have no power to give advisory opinions [Alabama State Federation of Labor v. McAdory, *325 U.S. 450*, 461, 65 S.Ct. 1384, 89 L.Ed. 1725] or to adjudicate constitutional questions in absence of "concrete legal issues, presented in actual cases, not abstractions." United Public Workers of American (C.I.O.) v. Mitchell, *330 U.S. 75*, 89, 67 S.Ct. 556, 564, 91 L.Ed. 754. These principles apply to actions for declaratory judgments. Electric Bond & Share Co. v. Securities and Exchange Comm'n, *303 U.S. 419*, 443, 58 S.Ct. 678, 82 L.Ed. 936.
>
> The Tenth Circuit went on to find that the repeal of the ordinance in question eliminated any justiciable controversy from this case. At the time the interest of the appellee-plaintiffs in the constitutionality of the questioned Oklahoma statutes became hypothetical. One who is not affected by a statute may not question its constitutionality. Barrows v. Jackson, *346 U.S. 249*, 255, 73 S.Ct. 1031, 97 L.Ed 1586; Tileston v. Ullman, State's Attorney, *318 U.S. 44*, 46, 63 S.Ct. 493, 87 L.Ed. 603.

> The Tenth Circuit thus determined that the case was moot and, in accordance with approved practice, [See United States v. Munsingware, Inc., *340 U.S. 36*, 39, 71 S.Ct. 104, 95 L.Ed. 36] the judgment was reversed and the case remanded with directions to vacate the judgment and dismiss the action.

This Court has also ruled that constitutional judgments are justified only out of necessity of adjudicating rights in particular cases between litigants brought before the court. ***Broadrick v. Oklahoma***, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed 2d 830 (1973).

Based upon the foregoing authorities, the Tenth Circuit properly refused to consider the constitutional arguments concerning the 1980 amendment of 47 O.S. §2-305 after the matter became moot by the 2002 amendment. Clearly, Petitioners have not demonstrated how the Tenth Circuit decision was in conflict with established law or that it departed from the accepted judicial proceedings; accordingly these contentions of error must also fail.

5. Because the Appeal was Dismissed as Moot, the Tenth Circuit Did Not Have to Rule on the Correctness of the Trial Court's Decision and Therefore Petitioners' Propositions II and III are Irrelevant to This Court's Consideration.

In the OPINIONS AND ORDERS BELOW, Petitioners' state "1. On April 24, 2003, the Tenth Circuit Court of Appeals **affirmed the decision** entered by the United States District Court for the Western District of Oklahoma." (Emphasis ours.) This is not a correct statement concerning the ruling by the Tenth Circuit Court of

Appeals. Sup. Ct. R. 15(2). The Tenth Circuit concluded that the issues raised by the Plaintiffs/Appellants were moot and dismissed their appeal. (See the Order and Judgment filed on April 24, 2003.) Despite the Petitioners' assertions to the contrary, because the Tenth Circuit dismissed the case as moot, the Court of Appeals did not have to rule on the correctness of the trial courts' decision concerning the Statute of Limitations. A review of the Tenth Circuit's decision establishes that it did not rule on the Statute of Limitations issue. Accordingly, questions 2, 3, 4 and 5 from the QUESTIONS PRESENTED by the Petitioner in the Petition for Writ of Certiorari are wholly irrelevant to the matter before this Court.

Furthermore, Propositions II and III of Petitioners' Petition are equally irrelevant to the matter before this Court because the Tenth Circuit dismissed the appeal below as moot. Petitioners' Propositions II and III do not address the correctness of the Tenth Circuit's ruling that the claims presented were moot and are simply the same arguments that were previously presented in their Reply Brief to the Tenth Circuit. Despite the fact that this is not a proper issue before this Court, a response will nevertheless be provided in order to demonstrate that contentions under Petitioners' Propositions II and III likewise lack merit.

a. Petitioners are not Entitled to the Protection Accorded by the *Baker* Case.

What Petitioners have not revealed to this Court is that none of the Petitioners were retired, receiving retirement benefits or entitled to receive retirement benefits when the 1980 amendment to 47 O.S. §2-305 occurred. The Petitioners' arguments completely lack merit and are

equally unsupported by competent and persuasive authority. For example, the Petitioners argue that when a member vests the contractual right becomes an inalienable property right. To support this position, Petitioners rely heavily on ***Baker v. Oklahoma Firefighters Pension and Retirement System***, 1986 OK 8, 718 P.2d 348. The ***Baker*** case, however, is unquestionably distinguishable from the appeal at bar on a very significant point. The plaintiffs in the ***Baker*** case timely brought their action and their action was not time barred.

In ***Baker***, the legislative change complained of occurred effective May 26, 1983, and the plaintiffs therein clearly filed their federal court action before the two (2) year statute of limitations expired. In fact, the questions certified to the Oklahoma Supreme Court were certified on May 7, 1985, by the federal court. The statute of limitations was not an issue before the court in ***Baker***. Thus, the ***Baker*** plaintiffs brought their cause of action within the applicable statute of limitations period, two years within which to bring an action in federal court to address legislative change of a statute. Here, where the Petitioners are contesting an amendment to legislative action occurring now over twenty-three (23) years ago, the same cannot be said.

The holdings in ***Baker*** are actually more supportive of the Respondents' position than the Petitioners. For example, in ***Baker***, the Oklahoma Supreme Court found that no contract exists between an employee and the State, concerning the state pension plan, unless and until the pension vests. ***Baker***, at 718 P.2d 352. Vesting, according to the Court, occurs as of the date of retirement. ***Baker***, at 718 P.2d 351, where the Court cited ***Board of Trustees v. Burns***, 1959 OK 275, 348 P.2d 1067. Thus, pursuant to

Baker, the law in Oklahoma regarding statutory pension contracts is clear. A contract does not come into existence between the state employee and the State (through one of its statutory pension systems) until the state employee becomes eligible for retirement.

Under the pension laws pertaining to the Oklahoma Law Enforcement Retirement System, "OLERS", all members, other than those who are disabled, are *not entitled* to begin *receiving payment* of the pension until they have completed twenty (20) years of service. Even if a member terminates his employment and thereafter makes the election to vest, the member would not be eligible for payment of the pension until such time as he reaches his normal twenty (20) year retirement date which is determined as if the member's employment continued uninterrupted. Petitioners in their own pleadings below have admitted that as of July 1, 1980, none of the Petitioners had yet retired. Clearly, as of July 1, 1980, none of the Petitioners had retired; none of the Petitioners had twenty (20) years of service; and none of the Petitioners were receiving the payment of pension benefits. **More importantly, however, the Petitioners have never alleged that they had twenty (20) years of service or were receiving payment of retirement benefits at the time of the 1980 legislative change.** Therefore, their pension rights had not become "**absolute**" as a matter of law and therefore the Oklahoma legislature could constitutionally amend the pension laws including 47 O.S. §2-305.

The intentions of the Oklahoma Supreme Court in ***Baker*** concerning vesting for the purposes of preventing changes to the pension law is made very clear when the Court stated:

> [T]he right of a claimant to a pension is controlled by the terms of the statute in effect when the right to a pension vests and [our prior cases] have implied that ***vesting occurs as of the date of retirement***. (Emphasis ours).

The Oklahoma Supreme Courts' conclusion in ***Baker***, again makes it clear that:

> **[T]he right to the retirement pension benefits provided to firefighters and police officers under our state statutory schemes *becomes absolute at the time those benefits become payable* to those eligible.** . . . (Emphasis ours).

Petitioners cited ***Baker*** for the proposition that pension benefits may not be changed once an employee becomes vested. However, this is not exactly what ***Baker*** held. Rather, ***Baker*** held that those firefighters who had retired or who could have retired and become eligible for payment of pension benefits prior to the effective date of legislative changes in the law acquired a right under those statutory provisions which could not be detrimentally affected by subsequent acts of the legislature. Thus, based upon the rulings in ***Baker***, because Petitioners' pension benefits were not absolute, the Oklahoma legislature could amend 47 O.S. §2-305, as to all Petitioners who could not have retired and become eligible for payment of pension benefits prior to the effective date of statutory change. Therefore, the acts of the legislature in 1980 changing Section 2-305 were not unconstitutional, nor violative of either the Oklahoma or federal constitution.

b. Statute of Limitations Apply to Petitioners' Claims.

Irrespective of the fact that the 2002 legislative amendment has rendered this matter moot and that the Petitioners' claims were time barred, the Petitioners nonetheless bring this appeal asking this Court to reverse the decision of the Tenth Circuit. The Petitioners argue that there is no Statute of Limitations. Conversely, the Respondents have previously supported the dismissal of this untimely brought case through citations of authority recognized by the District Court in its Memorandum Opinion of March 5, 2002, that indeed a statute of limitations does apply in this case and acts as a bar to the relief sought by the Petitioners. (See 12 O.S. Supp. 2000, §95; ***Gilbert v. City of Cambridge***, 745 F. Supp. 42, 46 (D. Mass. 1990); ***City of Oklahoma City v. Daly***, 1957 OK 209, 316 P.2d 129; and ***Meade v. Grubbs***, 841 F.2d 1512,1522-24 (10th Cir. 1988)).

c. Oklahoma Has Applied a Five Year Statute of Limitations to Claims Identical To Petitioners.

This Court should further consider ***Kinzy v. State ex rel. Oklahoma Firefighters Pension and Retirement System***, 2001 OK 24, 20 P.3d 818. ***Kinzy*** is the most recent decision of the Oklahoma Supreme Court concerning the issue of the statute of limitations to be applied to claims against a public retirement system similar to the Respondents herein. In ***Kinzy***, the Oklahoma Supreme Court applied a five (5) year statute of limitation to claims filed by firefighters seeking a retroactive payment of retirement benefits and determined their claims to be time-barred. The ***Kinzy*** Court declined to recognize

Plaintiffs' claims of a breach of fiduciary duty and instead treated the case as a breach of contract applying 12 O.S. 1991, §95, subd. 1. The significance of ***Kinzy*** to the instant appeal is that the Oklahoma Supreme Court has ruled that litigation such as the Petitioners have brought herein can be time barred. The ***Kinzy*** Court further recognized the jurisdictional limitations upon the United States District Court in ***Baker***, supra, by recognizing the limitations imposed by the Eleventh Amendment of the United States Constitution.

The Court in ***Kinzy*** specifically stated: "The enactment of a statute of limitations is a legislative expression of policy 'that prohibits litigants from raising claims after the expiration of a given period of time'. Generally the limitation period for a breach-of-contract claim accrues when the party asserting it first acquires the right to sue." The ***Kinzy*** Court further stated: "A prudent plaintiff is required to pursue its claim with reasonable diligence. Those who refrain from pursuing inquiries plainly suggested by the facts will not be extended the benefit of a rule which would toll the applicable statutes of limitations." Here, the action brought by the Petitioners twenty-one (21) years after the 1980 legislative amendment cannot be said to have been pursued with reasonable diligence.

d. The Opinion of the Attorney General of Oklahoma cited by the Petitioners is Inapplicable to the Oklahoma Law Enforcement Retirement System.

Petitioners next argue that once a law enforcement officer has vested, the contractual nature of the obligation changes to a property right. In support of their argument,

Petitioners reference an Oklahoma Attorney General's Opinion. Petitioners state that in the referenced Attorney General Opinion, it states that pension benefits offered by OLERS have been held to be significantly different from those of other public employees. They further claim that the distinctive nature of the law enforcement pension plan is discussed in detail. Although, the Petitioners have never supplied to the Respondents a copy of their referenced Attorney General's Opinion, Respondents believe that the Opinion they have referred to is Attorney General's Opinion 95-45, dated March 28, 1996. This Opinion does not specifically refer to OLERS at all. The primary focus of this Opinion related to the Oklahoma Public Employees Retirement System, 74 O.S. §901 et seq. That system is not the same as OLERS. The other references in that Opinion refer to the Oklahoma Police Pension and Retirement System and the Oklahoma Firefighters Pension and Retirement System. These systems are found at 11 O.S. §49-100 et seq. and 11 O.S. §50-101 et seq. Again, these two systems are also not OLERS. Clearly, the Petitioners' assertions made in Proposition III are incorrect, misleading, and improper because Attorney General's Opinion 95-45 does not discuss OLERS. Even if the Petitioners' statement were correct concerning the Attorney General Opinion, this advisory opinion would not overrule a decision of the Oklahoma Supreme Court. Thus, the holdings in ***Baker*** is the controlling authority and therefore the Petitioners' self-serving arguments concerning vested retirement benefits are erroneous as a matter of law and cannot serve as a basis to overturn the decisions below.

CONCLUSION

Petitioners' arguments fail to present a compelling reason for granting a Writ of Certiorari as the Tenth Circuit correctly applied longstanding precepts of both Oklahoma and Federal law in dismissing the underlying appeal as moot. None of the questions presented by Petitioners raise an important question of federal law that has not been, but should be, settled by this Court. Further, the Tenth Circuit's decision is not in conflict with the relevant decisions of this Court. Clearly, the Tenth Circuit was correct in declining to rule upon abstract propositions or to declare principles or rules of law which cannot affect the matter in issue in the case before it. This Court should therefore deny the Petition for Writ of Certiorari.

Respectfully submitted,

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